87-702

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-

EUGENE DONG, JR., M.D.
Petitioner

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY

and

JAMES B.D. MARK, M.D.

and

CLAYTON RICH, M.D.

and

JOHN SCHWARTZ

and

ZOLTAN LUCAS, M.D.

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

EUGENE DONG, JR. M.D.
In Pro Per
786 Holly Oak Drive
Palo Alto, CA 94303
Telephone (415) 494-3561

## QUESTIONS PRESENTED

1. What are the appropriate tests and procedures for determining whether or not non-political speech receives absolute First Amendment Privilege?

2. What privileges are accorded scholars under the First Amendment?

3. Do State Privacy provisions improperly restrict Academic Freedom?

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Eugene Dong, Jr., petitioner, respectfully prays that a writ of certiorari issue from this Court to review a judgement of the Court of Appeal, Sixth District, State of California in this proceeding on May 26, 1987.

## Citation to Opinions Below

The opinion of the Court of Appeal affirming the judgement of non-suit against petitioner as modified on denial of rehearing is reported at 191 Cal.App.3d 1572 and is contained in the appendix hereto.

## Jurisdiction

The judgement of Court of Appeal was entered on May 26, 1987. A petition for review by the California Supreme Court was denied July 22, 1987. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked

under 28 U.S.C. §1257(3).

Constitutional Provision Involved

The First Amendment provides in relevant part:

"Congress shall make no law ... abridging the freedom of speech, or of the press."

The Fourteenth Amendment provides in relevant part:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner, Eugene Dong, Jr., M.D., was an eminently successful transplant

researcher at Stanford University. He was promoted to associate professor with tenure in 1972 and was being compensated commensurately with his peers.

However, by 1979, petitioner still held the same academic rank; had been moved to a small office physically separated from his department; and was being compensated at only the 25th percentile for associate professors at Stanford. [Appendix A, p. 22]

In the intervening period, petitioner had undertaken a critical analysis of scientific publications of Dr. Zoltan Lucas, also a transplant researcher at Stanford University. [Appendix A, p. 8]. Petitioner's initial analyses of scientific fraud became the subject of two faculty committees. In 1975, at the express invitation of the second committee ["Feigen"], petitioner

submitted his analysis in writing circumstantially demonstrating that the Lucas data, published in journals and federal grant reports, were fabricated. [Appendix A, p. 10]. Over the next three years, Stanford prevented petitioner from confirming his discoveries by denying him access to the committees' reports and to the underlying data in Lucas' laboratory notebooks. [Appendix A, p. 12]. During this period, petitioner himself was subjected to legal threats, and to three successive investigations by Stanford of the same set of Lucas allegations about the scholarly integrity of publications, principally authored by Randall Morris in collaboration with petitioner and others. [Appendix A, p. 11]. Contemporaneously with the investigations, Stanford selectively published false information indicating to petitioner and the

government that petitioner's conclusion of scientific fraud by Lucas had been discredited by both committees. [Appendix A, p. 14].

Subsequently, petitioner obtained three sets of documents which revealed that Stanford was involved in a complicated cover-up scheme at the expense of his peace of mind, professional advancement and Academic Freedom. The first set consists of Lucas' June 1978 letter of accusation against him[1], together with the Feigen Committee Report of October 2, 1975, which, in turn, contained Lucas' earlier accusatory letter of July 1975[2]. Dr. Lucas' accusations were made possible

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[1] This letter is the subject of the Second Cause of Action for defamation, and of Stanford's 1978 investigation of appellant.

[2] This letter is the subject of the First Cause of Action for defamation.

because Stanford, contrary to its expressed policy of confidentiality, identified petitioner to Dr. Lucas as the source of the critical analyses of his publications. In its report, the Feigen Committee concluded that petitioner had discovered significant scientific errors and fabrications on the part of Dr. Lucas. The Committee discredited Lucas' research, found probable fraud, and recommended to Stanford that it commence formal proceedings against Dr. Lucas.

Petitioner's second set of "code-breaking" documents was obtained under the Freedom Of Information Act. It consists of National Institutes of Health (NIH) records which include that Federal agency's correspondence with Stanford. Petitioner learned that Stanford had falsely asserted to the NIH in December, 1976, that the Feigen Committee had

reconvened and issued a report, following a resubmission of information by Lucas and a (fictitious) Dean's review. [Appendix A, p. 15]. This phantom report was reported to contain a final conclusion that there was no "wrongdoing" by Dr. Lucas. The NIH documents also reveal that formal disciplinary action, ultimately imposed upon Lucas in 1979 by Stanford for falsification of his bibliography in reports to the NIH, had nothing whatsoever to do with the scientific fraud discovered by petitioner, and reported by the Feigen Committee. [Appendix A, p. 18].

Petitioner ultimately obtained the third and final piece of the puzzle, Lucas' laboratory notebooks as a result of participating in a lawsuit against Dr. Lucas by A. Baronio Martins, Ph.D. [Appendix A, p. 22]. Both petitioner and

a questioned documents examiner have testified in deposition to their opinions that, among other irregularities, the books contain forged entries.

In 1979, Petitioner filed a 6 count complaint for libel, emotional distress, invasion of privacy and breach of academic contract. [Appendix A, p. 23]. Discovery of certain materials was denied by The Court of Appeal on state constitutional privacy grounds. Board of Trustees v. Superior Court, 119 Cal.App.3d 516 (1981). After two summary judgment motions, in November 1984, the matter came to trial. On the first day of trial, Dr. Lucas moved, *in limine*, "to exclude evidence", as a matter of law, that his publications were privileged "opinion". Stanford moved *in limine*, to "limit the scope of trial". [Appendix A, p. 26].

On November 14, 1984, the trial court held that Dr. Lucas' publications were privileged opinion; that the FOIA/NIH documents were "absolutely privileged"; that the Laboratory notebooks and expert evidence were irrelevant, constitutionally privileged, and confusing; and that the Feigen Report was privileged. The Trial Court stated no basis for its exclusion of evidence relating to Stanford's investigations of petitioner. [Appendix A, p. 27].

The parties stipulated that petitioner's Trial Brief Statement of Facts would be treated as his Opening Statement; and, as abridged to conform to the Trial Court's evidentiary rulings, would be properly non-suited.

The Appeal

The grounds for appeal and which are the bases for this petition for

certiorari were that the First amendment was erroneously construed by the trial court in the fact/opinion distinction and that the evidence was wrongly excluded because it was relevant to the vindication of petitioner's academic freedom rights.

After the trial of the cause herein and before the submission of the appellate briefs, the Sixth District Court of Appeal filed its opinion in Franklin v. Leland Stanford Junior University 172 Cal.App.3d 322 (1985). Professor Franklin challenged his dismissal on grounds that his conduct was protected by the First Amendment and that the University regulations authorizing his discharge were unconstitutionally vague. Stanford expressly bound itself in State court proceedings to First Amendment standards as a restriction on

its power to terminate Franklin's employment.

Petitioner thereupon briefed fully the his academic freedom rights to the Court of Appeal. [Appendix B, p.1-29]. The Court of Appeal's opinions in response were the following:

1) "The high court has not yet addressed the extent of a university's autonomy in deciding 'who may teach.' ¶We are unwilling to allow that autonomy to be circumscribed by the views of a single professor, no matter how righteous he may be." [Appendix A, p.51-52]

2) After citing its own decision in Franklin, "[i]n the same vein, the right to speak freely does not compel and audience to attend or to listen. The opportunity for critical inquiry and analysis, vigorous advocacy, and dialogue, all in the pursuit of truth (if

it is that) will be discerned and accepted. Galileo's inquisitors, for example, refused to accept the fact that the earth circles the sun. Here the University may have had a duty to the federal government to investigate the possibility of fraudulent research accomplished at the expense of federal funds. It may have had an obligation to the public at large, and to itself, to maintain high ethical standards of research in its medical school. But it has no corresponding duty to Dr. Dong as an individual." [Appendix A, p.53-54].

3) "We cannot perceive that Dr. Dong's own academic freedom was otherwise curtailed. From all that appears in the record, Dr. Dong was at all times allowed to teach, to argue, to complain, and to pursue his own research; and he apparently is still employed at the

University's medical school.

"We cannot and do not express any opinion as to whether Dr. Lucas in fact did false research; that question is plainly beyond our ken. But even if we assume, for the sake of argument--an assumption purely hypothetical--that Dr. Dong was entirely correct in his assertions, we nevertheless conclude that he has no cause of action against the University on that ground. ... publicity brings its own reward."[emphasis added]. [Appendix A, p. 55-56]

In his California Supreme Court, Reply to Respondent's Answers to Petition for Review, Petitioner again raised his academic freedom rights on the grounds of this Court's decision in Edwards v. Aguillard _ U.S. _ (1987), which had been decided following the submission of the Petition for Review by the California

Supreme Court. [Appendix C, p. 1-3]. The petition was denied and this petition ensues.

**Reasons for Granting the Writ.**

The decision below exemplifies and contributes to the confused state of the law on the critical, recurring issue of distinguishing between constitutionally protected expression from defamation; and the application of a workable methodology to the issue when it arises in disputes among scholars and scientists in the hard sciences. This Court has not previously provided guidance on the applicable test for distinguishing between the actionable defamatory fact and protected opinion, (if indeed the distinction applies at all to disputes between two private individuals), and the appropriate procedures courts should employ in applying such a test in cases such as

petitioner's. This Court should take this opportunity to do so, for to do otherwise would deprive a most significant segment of our society of a fair opportunity to defend "the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

In addition, Petitioner respectfully urges this Court to grant certiorari with respect to petitioner's Academic Freedom claim not only because the Court of Appeal appears to have missed the point of the First Amendment but also because the privacy holdings create uncertainty as to the publishibility of the information in Petitioner's possession concerning the allegations of fraud.

The Fact/Opinion Distinction

A scientist who submits to university

officials documented requests for investigations of alleged public and scientific fraud resulting in multiple investigations is making factual statements, and should be held to account for libel consistent with the first amendment.

The foundation of the fact/opinion distinction derives from this Court's statement in Gertz v. Robert Welch 418 U.S. 328, 339-340 (1974) that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on the public issues.'"

This Court has not yet spoken on the manner in which the distinction is to be made. As a result, the Federal Courts of

Appeal have fashioned various "tests" with a variety of permutations. These were recently reviewed in Ollman v. Evans 750 F.2d 970, 978 (1984). After the appellate briefs in the instant case were filed, the California Supreme Court in Baker v. Los Angeles Herald Examiner, 42 Cal.3d 254 (1986) adopted the Ollman plurality's totality of the circumstances test for determining whether the "average reader" would view the statement as fact or opinion. They are 1) the common usage of the allegedly defamatory words, 2) the verifiability of the statements, 3) the context of the statements (within the publication) and 4) the broader social context into which the statements fit.

The difficulty with the 'totality of the circumstances' test is that the factors described are merely tools of linguistic analysis. They provide no

principled basis for a connection between the subject matter of the challenged speech and the values of the First Amendment. Petitioner believes that this defect is at the heart of Justice Rehnquist's dissent on denial of the writ of certiorari in Ollman v. Evans 471 U.S. 1127 (1985):

> "At the time I joined the opinion in Gertz, supra, I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the market place and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious 'of the rich and complex history of the struggle of the common law to deal with this problem.' Hill, Defamation and Privacy Under the First Amendment, 76 Colum.L.Rev. 1205, 1239 (1976)."

Thus in Ollman, the plurality

oversimplifies the issue when it states, "[I]n a word, Gertz's reasoning immunizes an opinion, not because the opinion is asserted about a public figure, but because there is no such thing as a 'false opinion'." Ollman, supra, at 976. This overlooks the articulated rationale in Gertz, i.e., that there is a basis for protecting opinion as part of an uninhibited, robust and wide-open debate about public issues and of a competition of ideas. The extension of an absolute privilege for certain types of speech outside the political arena, clearly should incorporate a threshold determination as to whether the parties are in fact engaged in a competition of ideas and a robust debate before entering into a complex linguistic analysis whether the speech is fact or opinion.

The simple, undisputed facts in this

case are that Defendant Lucas wrote the subject letters in secret and Defendants Mark, Schwartz and Rich circulated them in secret. [Appendix A, p. 10,11]. To this day, with the blessing of two Courts of Appeal [Appendix A, p. 68], petitioner has been denied any opportunity to debate or rebut any conclusions reached by the "Wilson Committee", which was secretly convened by Defendant Rich in response to those letters. [Appendix A, p. 20]. May parties such as these have it both ways -- May they circulate defamatory words in secret and obstruct a full and open debate on these issues, while still claiming the benefit of a First Amendment privilege? Petitioner's case illustrates the need for this Court to grant certiorari to address development of an appropriate value-based First Amendment test for the absolute privilege to be

accorded certain types of non-political speech.

Petitioner now turns to the procedural issue of whether the application of an absolute privilege is a matter of law to be decided by the Court. Although Baker, supra, at 260, asserts that it is a question of law, Ollman states that this Court has not ruled directly on the issue. The Ollman court justifies that position by asserting that this Court has decided that other questions derived from the First Amendment are to be decided as matters of law. In addition, the Court argues that "predictability of decisions, which is of crucial importance in an area of law touching upon First Amendment values, is enhanced when the determination is made according to announced legal standards and when a body of public case law furnishes published

examples of the manner in which these standards are to be applied." Ollman, supra, at 978.

The test for defamatory meaning is phrased in terms of the average reader: a "publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.' Washington Post Co. v. Chaloner, 250 U.S. 290, 293 (1919). "'That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.'" MacLeod v. Tribune Publishing Co. 52 Cal.2d 536, 547 (1959). The court must determine whether a communication is capable of bearing a particular defamatory meaning, but it is for the

jury to decide whether a communication, found capable of a defamatory meaning by the court, was in fact so understood by its recipient. Gariepy v. Pearson, 207 F.2d 15 (D.C. Cir.), cert. denied, 346 U.S. 909 (1953). McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460, 1465 (D.C. Cir. 1983).

The test for opinion is also phrased in terms of the average reader: "To evaluate the totality of the circumstances of an allegedly defamatory statement, we will consider four factors in assessing whether the average reader would view the statement as fact or, conversely opinion." Ollman, supra at 979. In Baker, the Court cited MacLeod, a pre-Gertz case, for the proposition that in making the opinion determination, "the court must place itself in the position of the hearer or reader, and determine

the meaning of the statement according to its natural and popular construction." Baker, supra, at 260. There does not appear to be any legitimate basis for assuming that a court is in a better position to perform the linguistic analysis leading to a determination of "opinion", than it is for determining whether the words are capable of a "defamatory meaning".

Indeed, in the environment of today's technological society, the opinion of the Court of Appeal herein proves just the opposite. In cases like Baker, the alleged defamatory material appeared in a newspaper of general circulation. The material was written by lay persons in such a manner as to make the news understandable to the general reader. Similarly, in one of the few cases of libel to reach this Court involving a

scientist, Hutchinson v. Proxmire, 443 U.S. 111 (1978), the criticism contained in Senator Proxmire's Golden Fleece award was written not by scientists, but by lay persons for popular consumption. The operative presumption is that trial and appellate judges are members of and can identify with, the class of general "average" readers.

On the other hand, Dr. Lucas wrote his defamatory material for a specific, scientific audience. The trial judge was a scientific layman, and therefore disabled *ab initio* from assuming unassisted the position of the average reader of the letters at issue. The opening sentence of the opinion of the Court of Appeal, describing the defamatory July 24, 1975, letter proves this point:

> "Dr. Lucas' letter to Professor George S. Feigen, dated July 24,

> 1975, is typewritten, single-spaced, and five pages long minus exhibits. It contains a considerable body of scientific data and description which we are unable to evaluate[;]." (emphasis added) [Appendix A, p. 31].

Therefore, by its own admission the Court of Appeal was wholly disqualified from assuming the position of the reader and performing the required "context" analysis in the "totality of the circumstances" test.

Furthermore, the Court of Appeal observed that "Dr. Lucas enclosed eleven exhibits with the letter" [Appendix A, p. 34], but that it had only the letters "minus exhibits" before it [Appendix A, p. 31]. Therefore it was both a physical and an intellectual impossibility for either the Trial Court or the Court of Appeal to stand in the shoes of the recipients of these letters.

The "totality of the circumstances"

test is a linguistic analysis whose cornerstone is the mandate that the evaluator assume the position of the average reader and avoid viewing the material with a mind trained in law. As illustrated by the facts herein, it appears that courts of general jurisdiction are incompetent to evaluate the complex, technical language of science and medicine. In this circumstance, it is beyond comprehension, that the Court of Appeal denied both discovery and admission of direct evidence about the actual recipients of Dr. Lucas' letters, (the Wilson Committee and the Feigen committee) and substitutes its own speculative evaluation. Therefore the issue should be reserved for the trier of fact.

In connection with this point,

"Next, the context in which the statement was made must be considered.

> Since '[a] word is not a crystal, transparent and unchanged, [but] is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used[,]' the facts surrounding the publications must also be carefully considered. (See Towne v. Eisner 245 U.S. 418, 1918.) ¶This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." Baker v. Los Angeles Herald Examiner, *supra*, at 261.

This directive in Baker to consider the facts surrounding the publication clearly creates a new relevancy consideration in the fact/opinion inquiry. The class of evidence is the set of evidence relevant to understanding how Dr. Lucas' audiences understood his words and what Dr. Lucas intended by those words, which is underlain by the factual questions of what he was responding to and what his purpose was. Thus, if Dr. Lucas asserts in his publication that he is accusing

Petitioner of "practicing the same things he [Petitioner] accused Dr. Lucas of," [Appendix A, p. 32], then it is clear that the Court is bound to receive evidence of Petitioner's accusations. When Dr. Lucas makes assertions as to how the Feigen Committee received his allegations, then the evidence of the members of the Feigen Committee themselves, as well as their report, is relevant. [Appendix A, p. 38]. Therefore, given new relevancy considerations, the Feigen Report, the NIH documents, the Wilson committee activities, and the forensic evidence of scientific fraud should all be admissible as relevant to the fact-opinion determination in this case of professional defamation.

In addition to the "totality of the circumstances" test, the Court of Appeal invokes Restatement §566 to hold broadly,

that the "letters"[3] did not constitute actionable statements of opinion when the facts supporting the opinion are disclosed". The Court then stated the letter "did not imply there were undisclosed defamatory facts which prompted the writing. Instead the apparent aim of the letter was to set forth the precise information upon which Dr. Lucas' "belief" was based. Where the facts supporting a statement are

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[3] Appellant's complaint alleged that nine different, specific statements in two letters published over a three year period were actionable defamation. [Appendix A, p. 23-24]. Each statement is independently actionable, and if any one of them was not protected opinion, appellant was entitled to proceed to jury trial. Baker did not address this issue because there was only one statement at issue. It is clear from the discussion in Ollman that the members of the Court evaluated each alleged defamation separately in the context of the entire article and ruled with respect to each one. Here, the Court of Appeal held erroneously that the letters in their entirety were opinion.

disclosed, courts have found such statements to be non-actionable opinion." [Appendix A, p. 34-35].

There are two critical defects in the Court's holding. The first is that the proceeding at trial was a Motion in limine and therefore no "facts" were adduced [Appendix A, p. 27]; and, as the Court of Appeal admitted, it could not evaluate the "data" upon which Lucas' alleged "belief" was based [Appendix A, p. 31].

Secondly, the approach for analyzing statements which imply undisclosed facts is considerably different from the process of interpreting statements associated with disclosed facts. The fullest exposition of this distinction is found in the dissent in Ollman by Chief Judge Robinson:

> "This balancing of First Amendment and defamation implications of hybrid

statements works flawlessly where the critical background facts are accurately set forth. A significant imbalance results, however, when a hybrid statement appears without any recitation of the underlying facts, or when those facts are stated incompletely or erroneously.[68] When that is the case, the reader is unable to place the author's judgment in perspective, because he either is completely unaware of the predicate facts or is in some degree misled as to what they are. False hybrid statements obviously can wreak considerable damage to reputation.[69]

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[68] See Adler v. American Standard Corp., 538 F.Supp. 572, 576 (D.Md.1982) ["there is a distinction between simple opinions and expressions of opinion which indicate that they are based on undisclosed facts"]

[69] [Which is exactly what Dr. Lucas' defamatory statements were. The harm of which] has long been recognized: "To state accurately what a man has done, and then to say that in your opinion such conduct is disgraceful or dishonorable, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging himself for (sic ) the character of the conduct condemned, nothing but a false picture being presented for

> A reader supplied with no background at all may well assume that there are facts which support the derogatory conclusion, particularly if it is announced by the author with apparent assurance. [Footnote omitted]. A reader given materially incorrect or incomplete facts, mistakenly supposing that the pertinent data are accurately assembled before him, might give even more credence to the author's conclusion. [Footnote omitted] Hybrid statements unaccompanied by any predicate facts, or attended by defective recitals of the underlying facts, thus should occupy a very different position in the concerns of libel law, for their claim to First Amendment protection is far less compelling. If the background data reaching the reader are deficient, the hybrid statement is as much a representation of the facts it implies as it is a judgment or interpretation of the communicated data."[Emphasis added] Ollman, supra, at 1023.

Even if the fact/opinion determination is ultimately one of law for the court, it is well settled that it is up to the jury to settle any evidentiary disputes

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judgment." De Savitsch v. Patterson, supra note 64, 81 U.S.App.D.C. at 360, 159 F.2d at 17, quoting Christie v. Robertson, 10 New S. Wales L.Rep. 157.

over the facts upon which the legal conclusion is to be based. Ollman, supra at 1028:

> FN97. While I agree that the question whether a statement is one of fact or of opinion is to be decided by the court as a matter of law, see Maj. Op. at 978, it is up to the jury, if it is the trier of fact, to settle any evidentiary disputes over the facts upon which the legal conclusion is to be based. See Manbeck v. Ostrowski, 128 U.S.App.D.C. 1, 5, & n. 20, 384 F.2d 970, 974 & n. 20 (1967), cert. denied, 390 U.S. 966, 88 S.Ct. 1077, 19 L.Ed.2d 1170 (1968) (whether communication is privileged a question of law for court "where the facts surrounding its publication are undisputed"); Morgan v. Dun & Bradstreet, 421 F.2d 1241, 1242 (5th Cir.1970) ("(w)hen the evidence material to the privilege is in dispute, the trial judge is quite correct in submitting it to the jury"); Prosser & Keeton on Torts s 115 (5th ed. 1984) ("(w)hether the occasion was a privileged one is a question to be determined by the court as an issue of law, unless of course the facts are in dispute, in which case the jury will be instructed as to the proper rule to apply"). Two possible questions in this connection for the trier of facts are whether a hybrid statement predicated upon

> unreasonably inaccurate or incomplete background data actually conveyed a defamatory message to its audience, and, if so whether the author was culpable in making the error or omission creating the deficiency. Cf. Bose Corp. v. Consumers Union, supra note 87, --- U.S. at ----, 104 S.Ct. at 1958-1959, 80 L.Ed.2d at 515 (issue of malice is a question of fact); Porson v. Pojidaeff, 141 U.S.App.D.C. 139, 140-141, 436 F.2d 293, 294-295 (1970) (truth of statement is jury question); ...."

The Court of Appeal further holds that an In Limine Motion is the proper procedural vehicle for summary adjudication of issues predicated on First Amendment values. As far as petitioner can tell, this is a novel and unprecedented means of constitutional adjudication, never approved by this Court.

The Trial Court's ruling stemmed from a procedure that had no basis in precedent or statute. Such judicial improvisation and subjectivity may have

been efficient, but it was in no way consistent with the dictates of fundamental fairness and procedural due process. If efficiency in constitutional litigation is to be the norm, then this Court should grant certiorari and so inform defamation plaintiffs. If it isn't then this Court should grant certiorari to return the case for a trial on the merits.

Academic Freedom

Petitioner urges this Court to grant certiorari to consider two important issues raised by the decision of the Court of Appeal concerning Academic Freedom. The first question relates to the values which the constitutional right protects. The second concerns the prior restraints imposed on the freedom to publish admittedly controversial data by State Constitutional Privacy provisions.

Up to this decision, Academic Freedom has been considered a constellation of freedoms, consisting of the freedoms to teach, to think, to inquire, to dispute on the basis of facts, and to publish. It is the freedom to pursue truth wherever the path leads. Sweezy v. State of New Hampshire, 354 U. S. 234, 250 (1957). In Keyishian v. Board of Regents, 385 U.S. 589, 683 (1967) this Court said:

"The classroom is peculiarly the 'marketplace of ideas.' " 385 U.S. at page 603.

In this marketplace, it had been thought that access to data and the free exchange of same were considerations of the highest magnitude: This value is reflected in the long-standing policy of the University which petitioner relied on in the Courts below:

Secrecy in Research: "Resolve: 1. That the principle of openness in

research--**the principle of freedom of access by all interested persons to the underlying data, to the processes, and to the final result of research--is one of overriding importance.** [Appendix B, p. 2]

This value was not limited to this University, as was reflected by the decision of the Court in Wright v. Jeep, 547 F. Supp. 871 (E.D. Mich. S.D. 1982):

> "The value of the conclusions turns on the quality of the data and the methods used by the researcher in his analysis of that data as well as the skill and perception of the researcher. So if the conclusions or end product of a research effort is to be fairly tested, the underlying data must be available to others equally skilled and perceptive. *** [¶]The protection of the First Amendment is designed to afford the right to write and to speak. It does not give a right to withdraw material written and published from public scrutiny, nor does it give a right to refuse to disclose facts discovered as a result of observations that are relevant in making a judgment as to the correctness of the researcher's published conclusions." 547 F.Supp. at pp. 874-75.

Furthermore, it has been held by prior cases of this Court that the First

Amendment values were so important that mere investigations or threats of sanctions which chill the exercise of First amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. Keyishian v. Board of Regents, supra, 385 U.S. at 603.

In Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982) summary judgment on a medical school professor's First Amendment claim against his employer was reversed, and the case remanded for full evidentiary trial on the issue of motivation for his dismissal:

> "As a result, Peacock's First Amendment causes of action necessarily involve complicated questions of motive and intent. A fair resolution of these difficult issues requires a full trial on the merits. Indeed, we have recently reiterated that **'the decision as to an employer's true motivation plainly is one reserved to the trier of fact.'** [citations omitted]. For this reason, courts have

> traditionally held that summary judgment is inappropriate when 'questions of motive predominate in the inquiry of how big a role the protected behavior played' in the employment decisions. [Citations omitted] Without a searching inquiry into these motives, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of *post hoc* rationalizations." 694 F.2d at page 646 [Emphasis provided].

However, this Court of Appeal views Academic Freedom quite differently. The court indicates that the First Amendment "autonomy" of a University is threatened by a single professor daring to demand information on another charged with fraudulent science. [Appendix A, p. 52]. This Court of Appeal indicates that individual scholars have no right to second guess the accuracy of the publication of any other scholar, fraudulent or not, by an independent evaluation of the original data. [Appendix A, p. 47]. This Court of Appeal

holds that a State right of privacy of administrators is more important than the academic freedom of the scholar to engage in an open and vigorous debate on academic matters. [Appendix A, p. 47] The decision is clearly a departure from the cases cited above, and this Court should address the institutional tilt it reflects.

Finally, this Court should grant certiorari to evaluate the prior restraint effects on publication when laboratory animal research information is held to be protectible under state constitutional privacy provisions.

Prior decisions of this Court indicate that "Privacy" concerns carry a very heavy burden when held up against First Amendment rights in matters of public concern. This Court has reserved judgment only on the issue of whether or

not publication of truthful "intimate" facts which outrage community "notions of decency" may be punished under State privacy laws. Time v. Hill 385 U.S. 374,383 (1967), Footnote 7. Organization For a Better Austin v. Keefe, 402 U.S. 415 (1971). Cox Broadcasting Corp. v. Cohn, 95 U.S. 469,488 (1975). See also, Commonwealth v. Wiseman, 356 Mass. 251, *cert. denied*, 398 U.S. 960 (1970). Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). Actions for invasion of Privacy may not be maintained when the expression is of a kind that is of **"legitimate concern to the public"**. Connick v. Myers 461 U.S. 138 (1982).

In this case, the Court of Appeal let stand the holding that the "lab books and the evidence regarding the research and scientific work by Dr. Lucas" would be excluded from evidence. 'The Court finds

it is not relevant and that in light of the Constitutional right of privacy it should be excluded.' [Appendix A, p. 41]. Now, petitioner has that evidence in his possession. It is obviously controversial and about a public matter. Shall petitioner publish and face an 'invasion of privacy' constitutional tort, or censor myself and go away?

## Conclusion

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

Eugene Dong, Jr., M.D.
In pro per
786 Holly Oak Dr.
Palo Alto, CA 94303